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December 8, 1997

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DEC 8 - 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie. R. Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: In the Matter of Closed Captioning and Video
Description of Video Programming, Implementation of
Section 305 of the Telecommunications Act of 1996, Video
Programming Accessibility, MM Dkt. No. 95-176

Dear Ms. Salas:

Enclosed please find an original and five copies of the Reply of the National Association of the Deaf and the Consumer Action Network in the above captioned docket. It has been served on all interested parties.

I would appreciate your referring all correspondence regarding this matter to my attention.

Sincerely,

Karen Peltz Strauss
Legal Counsel for Telecommunications Policy

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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) MM Docket No. 95 - 176
Implementation of Section 305 of the)
Telecommunications Act of 1996)
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Video Programming Accessibility)

**REPLY OF THE NATIONAL ASSOCIATION OF THE DEAF AND
THE CONSUMER ACTION NETWORK**

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**REPLY OF THE NATIONAL ASSOCIATION OF THE DEAF AND
THE CONSUMER ACTION NETWORK**

I. Introduction

The National Association of the Deaf (NAD) and the Consumer Action Network (CAN), collectively referred to as the "NAD et. al.," submit this reply to the various statements submitted in response to their Request for Reconsideration in the above-captioned proceeding.

Many of the statements submitted in opposition to the NAD et. al. Request for Reconsideration noted that the Commission had achieved a balance between the interests of the captioning viewing community to obtain greater captioning and the interests of the networks to maintain flexibility and exercise economic restraint in providing captioning access. See, e.g., Opposition of the National Cable Television Association (NCTA) at 2; Response of Lifetime Television at 1-2. Having achieved such balance, for the most part, these petitions urge the FCC not to take any actions that will further expand the captioning requirements.

The NAD et. al. agrees that the Commission's final Report and Order (R & O) in this proceeding reflects a considerable effort to balance the varied interests of the parties to this proceeding. This effort is perhaps best revealed in the transition schedules for captioning new and old programming. Respecting the need to balance these interests, the NAD et. al. refrained from challenging these schedules, notwithstanding our various earlier proposals for and our continued interest in having a much shorter timetable for the implementation of the captioning mandates.¹ Rather, the NAD et. al. was careful to limit its Request for Reconsideration only to those items contained in the final Order which constitute clear violations of Congressional intent. This intent, as expressed in both Section 713 and its legislative history, was to create rules that would achieve full access to new programming and to maximize access for pre-rule programming. To ensure that this objective would be accomplished, Congress carefully and narrowly crafted limited exemptions to the captioning mandates. Unfortunately, the FCC's Order goes well beyond the scope of these intended exemptions, and fails to establish enforcement mechanisms that will ensure the full and effective implementation of the captioning mandates. In our Request for Reconsideration, we explained why the Commission must revise its rules to bring them closer to fulfilling the Congressional intent of Section 713. We now respond to some of the points raised

¹ See Comments of the NAD in response to the FCC's Notice of Proposed Rulemaking in MM Dkt. No. 95-176 at 4-6, requesting a transition schedule of 3-4 years for new programming (February 28, 1997). To a limited extent, the Commission's decision to impose hourly, as opposed to percentage, requirements may make up for the long delay in implementation of the captioning mandates for some networks. We urge the FCC not to change this rule, as it should not prove burdensome, even for networks that primarily exhibit pre-rule programming. Even though such networks would be required to caption a larger percentage of their new programming (see, e.g. Response of A & E at 7-8), as the Game Show Network (GSN) points out, they "produce proportionately less new programming." Comments of GSN at 4. Thus, overall, their captioning obligations are likely to increase only marginally with the hourly mandates.

by statements submitted in opposition to our Request.

III. The *De Minimis* Exemption Will Not Be Used As Intended by the FCC.

In our Request, we argued that the Commission lacked the authority to grant a *de minimis* exemption of five percent, and raised concerns that this exemption would not be used for the limited purpose for which the FCC intended. We reiterate these concerns, and are now able to point to specific statements contained in the oppositions to our Request that already substantiate our concerns.

The FCC has stated that the need for a *de minimis* exemption stems from the fact that some programs may not have captions because of “unforeseen difficulties” that “unintentionally result in video programming providers being unable to provide such new programming with captions.” R & O at ¶43. Yet, the National Association of Broadcasters (NAB), NCTA, and the Association of Local Television Stations (ALTV) already admit that they would employ this exemption for other purposes. For example, NAB and NCTA explain that they would use this exemption in lieu of obtaining an undue burden exemption. According to NAB, “[r]ather than having to demonstrate that captioning would create an undue burden for particular programs, such as one-time local events, broadcasters can simply use their *de minimis* exemption.” Opposition of NAB at 5. Similarly, NCTA refers to “the administrative difficulties in obtaining an undue burden waiver,” as a reason for needing this type of exemption. Opposition of NCTA at 6. ALTV would “bank” its five percent allowance, and use it for coverage of such events as the “Air Florida crash, the MARC train wreck, and the blizzard of 1996,” all of which provided crucial emergency information critically needed by all Americans, including those who are deaf and hard of hearing. Opposition of ALTV at 4, n.7. It is clear from these statements that, as we predicted

in our Request, video program providers are likely to use the *de minimis* exemption in any manner they see fit, rather than for the occasional program that arrives without captions shortly before the scheduled air time. This is so, despite the fact that Congress specifically created a separate process for obtaining individual undue burden exemptions, and the fact that the FCC apparently only intended the *de minimis* exemption to apply to unintentional and unplanned captioning difficulties. For this reason, and the various other reasons enumerated in our Request, we again urge the Commission to revoke the *de minimis* exemption, and to require providers to instead transmit the occasional uncaptioned program, accompanied by a brief post broadcast statement to the FCC that explains the failure to include captions.² In the alternative, we propose that the FCC reduce its *de minimis* exemption to a figure, such as .05%, that provides needed relief for providers that are truly confronted with the occasional predicament that leaves them without captions at the eleventh hour.³

² ALTV complains that providers should not need to be accountable for their failure to caption a given program because the Commission does not have a standard by which it can adjudicate complaints. ALTV concludes that the result would be “not only a new wave of complaint proceedings, but also [the] development of a body of law to govern such complaints.” *Id.* at 4 n. 8. ALTV’s reasoning is illogical. As the agency responsible for ensuring the effective implementation of Section 713, it is precisely the FCC’s responsibility to establish whatever rules and standards are necessary to govern such complaints. Moreover, ALTV ignores the fact that the Commission has already established a procedure for the receipt and adjudication of complaints stemming from noncompliance with its captioning mandates.

³ NCTA’s references to other situations where the FCC has applied a five percent *de minimis* rule are inapposite, as they do not, as here, involve statutes that clearly provide other, more limited provisions for specific exemptions from their mandates. *See* Opposition by NCTA at 7-8, nn. 20, 21.

III. A Permanent Exemption for all Spanish Language Programming is Unnecessary.

Univision, Grupo Televisa, S.A., and Telemundo Group, Inc. have submitted statements urging the FCC not to eliminate its exemption for Spanish language programming. Yet a careful review of each of their opposing statements demonstrates that a complete and permanent exemption for all such programming is neither necessary, nor permissible under Section 713 of the Communications Act.

Univision's Opposition points out that, in an ex parte contact with the FCC, Univision had requested a full exemption for all Spanish language programming, rather than a delay in the application of these requirements. Yet much of Univision's request still appears based on concerns that it will not be able to fulfill the captioning mandates *at the present time*. For example, Univision explains that its request for an exemption had been based on research which "indicated that captioning Univision's programming with the scant technical and personnel resources available *today* was impossible." Opposition of Univision at 2 (emphasis added). Later in its Opposition, Univision again states that there are "*presently* very few personnel or facilities available to caption Spanish language programming." *Id.* at 5 (emphasis added). In a similar vein, Telemundo seems to put great stake in the Commission's conclusion that "the personnel and the facilities necessary to caption languages other than English are extremely limited," as its justification for a complete exemption. Opposition of Telemundo at 4, citing R & O at ¶147; see also Opposition of Grupo Televisa at 4 ("the technical equipment and standards necessary for the creation and transmission of such captions do not *yet* exist," citing R&O ¶147 (emphasis added)).

As we stated in our Request for Reconsideration, the NAD et. al. recognizes that the ramp up to captioning access for Spanish language programming may not take place overnight. We

recognize that Spanish language captioning is in its infancy, and that additional time may be needed to bring it up to the level that English captioned programming will achieve within a shorter time frame. Nevertheless, none of the arguments put forth by the providers mentioned above justify a complete and total exemption for nearly all Spanish language programming⁴ There is a huge Spanish speaking population now living in the United States that is ready and able to provide a sizable employment pool from which to obtain qualified Spanish language captioners.⁵ While training these captioners may take a one or two years, once these individuals are fully trained, captioning agencies indicate that utilizing their services will not be any more expensive than utilizing the services of English skilled captioners.

Grupo Televisa also complains that there is little incentive for foreign producers to supply captions for the American market, since these producers need not provide captions for markets elsewhere. According to Grupo Televisa, “no other country in the world currently requires video programming to be captioned. . . .” Grupo at 5. As we noted in our Response to other requests for reconsideration, however, at least one other country, Canada, does have a captioning law. Response of NAD et. al. at 5 (November 26, 1997). Moreover, other countries, including England, New Zealand, Australia, and Japan do utilize captioning on some of their television programs. Finally, captioning agencies report that yet other countries have begun to express an

⁴ We recognize that the Commission’s Order does not exempt all Spanish language programming, as it does require captioning for news programs utilizing TelePrompTers.

⁵ In fact, many such individuals have had significant difficulties securing employment because of their limited English skills. These same individuals would be well qualified for captioning Spanish language programs. The fact that so many Spanish speaking Americans are available for employment refutes Univision’s supply and demand argument that captioning non-English language programming will be more expensive than English language captioning because of a scarcity of foreign language resources. See Opposition of Univision at 6.

interest in captioning their programs as well. In any event, as we noted in our Request, the considerable size of the Spanish speaking population in the United States makes its abandonment highly unlikely. Moreover, it is important to point out that a captioning requirement of this nature would not present the first time that the United States has created a requirement for disability access which affects production in foreign countries.⁶

Univision is correct that we are undeterred by some of the logistical problems that might exist with respect to captioning foreign language programming. Opposition of Univision at 5. This is hardly the first, nor is it likely to be the last time that consumers will be confronted with arguments about obstacles to providing access. Yet the fact remains that none of the problems raised by any of the Spanish language networks or distributors are insurmountable. Rather each of these logistical problems can be overcome with time, patience, and ingenuity, as has been true for so many barriers to access in the past.

In sum, the fact that some programming may merit an FCC exemption based on economic burden, or that some networks may need extra time to provide captions, is little reason to impose an across the board, permanent exemption for all such programming. We urge the Commission to reverse its decision to eliminate captioning for all Spanish speaking deaf and hard of hearing persons, and to craft instead a captioning mandate for such programming that truly balances the need for such access with legitimate concerns that may be raised by the networks.

⁶ Requirements for all wireline telephones to be hearing aid compatible, 47 U.S.C. §610, and for all televisions over thirteen inches to have built-in decoders, 47 U.S.C. §§303(u), 330(b), regardless of where these devices are manufactured, offer two such examples of FCC mandates that impact production in foreign countries.

IV. Consumers Do Not Have Resources to Monitor Compliance with the Captioning Mandates.

In our Request for Reconsideration, we urged the Commission to establish recordkeeping and monitoring requirements that would ensure the effective implementation of the captioning mandates. NCTA opposes our proposal and suggests that the decision of the FCC not to impose such requirements is consistent with its action in other arenas. But a careful look at the rules cited by NCTA reveals that in fact, most involve situations where complaints are to be made by other members of the industry, for example, competitors filing complaints in the program access arena and broadcasters filing must carry complaints against cable operators. See Opposition of NCTA at 17. In these arenas, the parties filing the complaints have resources which are considerably greater than those available to caption consumers. In contrast, as we noted in our Request, the Commission's rules on captioning more aptly parallel its rules on children's educational and information programming. There, as here, consumers will need tools to assist them in determining whether a complaint is warranted. Here, as there, the FCC should establish public reporting requirements to improve the accountability of video providers and to facilitate public monitoring.

V. Miscellaneous Matters

The NAD et. al. submits the following additional points:

A. Real Time Captioning for News Programs - The NAB argues that stations in smaller markets will be forced to abandon all captioning of their news programs if they are required to seek waivers from a real time captioning requirement. This can easily be avoided with a mandate for real time captioning by stations in larger markets that can afford such captioning, coupled with a mandate for electronic newsroom captioning by stations currently unable to meet those

expenses. Such a result would not only offer a vast improvement for consumers; it would be in keeping with legislative intent to provide full captioning access to video programming where economically viable.⁷

B. Advertising - None of the statements submitted in opposition to the NAD et. al. Request were able to point to anything in the 1996 Act or its legislative history to support the wholesale exemption for all short form advertising. NAB's arguments that Congress' silence justifies the exemption holds little weight, given the strong legislative intent to provide *full* captioning access to all new video programming. Moreover, NAB's statements to the contrary, the various cases cited in the NAD et. al. Request reflect an overriding governmental interest in providing consumers with complete access to commercial information for informed decisionmaking in making purchases. FCC action requiring access to advertising through captions would hardly conflict with these cases, as the NCTA would have the FCC believe. Opposition of NCTA at 9. Rather than dictate the "content of advertising," id., such action would dictate *access* to advertising by deaf and hard of hearing individuals, regardless of the advertising content.

C. New Networks - We restate our opposition to revising the new network exemption from the launch date to the date of enactment of the FCC's rules. As noted by Self Help for Hard of Hearing People, Inc., networks knew, as early as February of 1996, that captioning obligations

⁷ NAB raises the prospect of other technologies, such as voice recognition technologies, for the captioning of local news. Opposition of NAB at 10. Consumers remain open to new technologies that are able to offer comprehensive and high quality captioning services. NAB does not suggest, however, that voice recognition technologies can achieve this result at the present time, or in the foreseeable future. For now, then, real time captioning appears to be the only means of providing full captioning access to news programs.

would be in place some time around August of 1997. Thus, they cannot now suggest that these obligations were unanticipated. Insofar as the new rules intend for captioning to become an integral part of programming production, it makes plain sense for these networks to begin to make the needed arrangements to implement captioning during their grace period, so that they are fully capable of fulfilling their obligations when their exemptions expire.

D. Undue Burden Requests - The NAD et al. notes that none of the Oppositions to its Request opposed, and in fact, NCTA supported, the establishment of an outer time limit by which the FCC should issue its rulings on undue burden exemption requests. Opposition of NCTA at 14. We again urge the FCC to adopt this proposal.

VI. Conclusion

For all of the foregoing reasons, we urge the FCC to grant the Requests for Reconsideration submitted by the NAD et. al. and SHHH, and to reject the other Requests for Reconsideration in this proceeding.

Respectfully submitted,

National Association of the Deaf
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December 8, 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Statement were mailed, postage prepaid, this

8th day of December, 1997, to:

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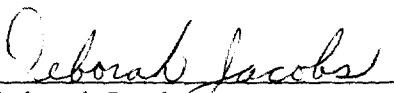
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